7/02 Exam Multistate Essay Examination Question 1 - Sample Answer #1

1) A secured party has a right to repossess collateral in which it has a security interest without judicial process if the debtor defaults on the security agreement. The first question is whether Uptown had attached a security interest in the motor home. In order for a security interest to attach, the debtor must (a) have rights in the collateral; (b) receive value from the creditor; and (c) authenticate a security agreement. In this case: (a) Debtor owned the motor home after the sale, (b) Debtor received value in the form of credit; and (c) Debtor signed a security agreement. Therefore, Uptown had a valid security interest in the motor home, and was entitled to repossess upon default. It is not required that the secured party give notice to the debtor, unless the security agreement provides otherwise. Therefore, Uptown had the right to repossess the motor home without giving notice and without the use of judicial process.

2) Although a secured party has a right to repossess collateral upon default, it must do so in a way that does not create a breach of the peace; and in a way that does not unreasonably damage the collateral. Debtor could argue (1) that the repossession amounted to a breach of the peace. A breach of the peace occurs when the repossession creates an unreasonable risk of violence; there need not be any actual violence in order to constitute a breach of peace; the risk is sufficient. Debtor could argue that Uptown's repossession created a risk of violence because Debtor had already warned Ernest to stay away or he would throw him out; and also entering Debtor's residence created a risk of violence because there could have been someone else inside the home who may have thought Ernest was an intruder and used violence to defend himself. Furthermore, Debtor could argue (2) that "hot-wiring" the motor home caused unreasonable damage to the motor home, especially since the facts show that Uptown had a duplicate key. (The fact that the deputy sheriff was watching would not be a good defense to a breach of the peace claim. In fact, Debtor could use that fact to argue that Uptown was expecting there to be some tension or violence by bringing along the sheriff. Thus, it would appear that Uptown knew of the risk of violence, and thus was in breach of the peace.)

7/02 Exam Multistate Essay Examination Question 1 - Sample Answer # 2

Question 1

Yes, Uptown had a right to repossess upon default, regardless of notice. Under Article 9 of the UCC, a valid security interest that has attached to collateral gives the secured creditor a right to repossess the collateral goods upon default. Repossession can be by self-help (so long as no breach of peace) or by replevin. Here, the security agreement has attached, because there is a written agreement, Uptown gave value, and D has rights in the motorhome. Likewise, the motorhome is "goods" for the purposes of art 9 because it's in existence, identified, and not a real property interest. Thus, article 9 applies, and Uptown was allowed to use self-help possession without giving notice of default. Notice is only required before Uptown sells the collateral, which has not occurred. * I would need to research whether it makes a difference that the motorhome was the debtor's actual home.

Question 2

Self-help repossession of collateral is only allowed if it can be accomplished without a breach of peace. BOP occurs whenever the repossession creates a serious risk of violence, even if violence does not actually occur. In determining breach of peace, you look to the totality of the circumstances.

It is an automatic breach of peace if the creditor involves the sheriff in the repossession , the policy being that the sheriff's presence may lead the debtor to believe that he cannot resist. Here, however, debtor did not see sheriff, and sheriff did not actually participate in the repossession. Sheriff simply observed. Thus the sheriff's involvement was probably not a breach of peace. Debtor's strongest argument would rely on (1) the failed attempt to repossess and (2) Earnest's knowledge that the motorhome was the debtor's home. Normally, a repeated attempt to repossess after being turned away is not a breach of peace, so long as enough time has passed and there is no serious risk of violence. However, on the first attempt, Earnest learned that the motorhome was debtor's actual home, and that it contained debtor's clothes and belongings. As such, debtor had a very strong interest in keeping the motorhome, as well as a privacy interest. These facts make the risk of violence more likely.

The use of the "ploy" generally does not lead to breach of the peace. Nor does the fact that Earnest hot-wired the motorhome. Uptown had a right to repossess.

Finally, there may be a breach of peace if the creditor committed a breaking and entering. However, debtor left the motorhome unlocked, so the entering is not a breach of the peace; especially since no damage was done.

Finally, debtor could argue that it was unlawful to take possession of debtor's clothes and belongings in the motorhome. However, so long as these belongings are promptly returned, it is unlikely that the creditor has done anything wrong.

7/02 Exam Multistate Essay Examination Question 1 - Sample Answer #3

1) In the event of default - left undefined by Article 9 of the U.C.C., which provides the rules of law regarding secured transactions - a secured party may repossess collateral that secures the obligation owed to the secured party (usually, but not always by debtor, who is usually the obligor). First, there must be a valid security agreement between the debtor and the secured party; the facts indicate that debtor signed a security agreement, so there is a valid security interest (assuming debtor has rights in the collateral). Since this is a contest between the secured party and the debtor, perfection is not an issue. (By the way, since the trailer appears to have been sold on credit and the seller appears to have retained a security interest in the trailer, this is a purchase money security interest, one that is automatically perfected because the trailer is consumer goods.) If the contract between debtor and Uptown (secured party) makes failing to make several monthly payments an event of default (which is probably so), then Uptown had a right to resort to self-help, including hiring an independent contractor (Ernest) to repossess the collateral.

In the event of default, the secured party must send notice of an impending foreclosure sale, whether public or private; however, there is no requirement that debtor be sent a notice of repossession. Such a requirement would defeat repossession via self-help. So SP did not break a law by having Ernest repossess without notice of repo. Judicial process - an action in replevin - is one way to repossess collateral when a debtor has defaulted. However, this is <u>not</u> required.

2) There is a restriction on repossession though: In no event may the secured party effect repossession in such a way as to risk breach of the peace (also not defined by the U.C.C.) Breach of the peace is understood to mean to engage in acts likely to instigate a violent confrontation, which may lead to fighting or other violence. Uptown cannot avoid liability for Ernest's breach of peace - if breach occurred - by having made Ernest an independent contractor; the duty is non-delegable. Here, the facts indicate that Ernest used a duplicate; without checking whether Debtor (or anyone else was inside). This is likely to cause a breach of peace. That the RV was on a public street is mitigating because it is less likely someone inside if its parked. (But this is <u>very</u> weak mitigation if Debtor was on a trip and the RV was not outside his home.) "That Debtor said "Get out of my home" indicates it was his home - making it more likely the repo man breached the peace. Also, the fact that he said this was the only place he had to live and that his clothes were there indicate was his home. That no violence resulted - after being told to get out, Ernest left - does not mean there was no breach of peace risked (per se). Ernest is allowed, by law to enter an RV, just as he is allowed to enter a car with a duplicate key to repossess. That there was no violence and that Ernest left when asked to makes it highly probable a court would

Debtor's second argument might be that Uptown, via Ernest, breached the peace by fraudulently inducing Debtor by the fake-notice of a free steak dinner to go to the local restaurant as a rouse to recover the RV. While force likely to cause a breach of peace is verboten, trickery (not involving force) is allowed. For instance, in one case a bank, with a security interest in a car requested a customer come into the bank for a reason unrelated to the default; while inside the repo man repossessed the car. While in that case, which I think was a Mo. one, the court did find fault with what an employee at the bank told the debtor - in effect, "Yes, we took your car but you can walk

your ass home!" - it did not find fault in the trickery. Debtor will probably lose this argument.

(If there was no default, the repossession by Ernest plus his attempts were wrongful. Either trespass of chattel or conversion.)

The third argument Debtor will make is that the presence of the sheriff made the repossession improper. Using color of law - e.g. the presence of a sheriff - to help the secured party (SP) to repossess the collateral is a breach of peace. Here, the facts indicate the sheriff did not assist in repossession, only watched from a distance in case he must intervene, there was no such assistance, so the repossession was proper.

Debtor's final argument is that by "hot-wiring" the RV Ernest damaged it - and that was either a breach of the peace or an improper repossession. Ernest had a key - or at least access to a key - so the need to hot wire wasn't present. In the event that Debtor redeems his collateral, SP may be liable for any damages, but because no threat of force was present, in part because Debtor was, apparently, unaware of the repossession, there was no breach of peace. The repossession was ok.

Unless there was no default, the repossession was ok.

7/02 Exam MEE Session Question 2 - Sample Answer #1
Missouri Board drafted this question in lieu of MEE 2.

(Q1) A will must be presented for probate within 1 year from the date of the Testator's death. Had Tina presented the will prior to the expiration of the 1 year she would have taken everything.

Since in essence Todd died intestate, Missouri intestacy statute governs. It provides that if a person dies survived by spouse and no kids - spouse gets everything. If survived by spouse and kids all of who are Testator's and spouses - spouse get first $20,000 and ½ of rest = kids get rest. If survived by spouse and kids of different marriage = spouse gets ½, kids get ½. If no spouse and only kids = kids get everything. If no spouse and no kids = parents and brothers and sisters get equal shares. If no spouse and no kids and no parents, brother, sisters = then go to grandparents and descendants.

Here because Todd died intestate with no kids, spouse or parents, his only brother takes everything. Tina gets nothing.

(Q2) A testator is free to disinherit his children by completely disposing of his estate in a manner which doesn't provide for them. (There is no problem here with pretermitted children because all children were alive at time of will.)

By putting P.O.D. on his CD's and bank accounts, he effectively takes those items out of his probate estate. If properly done, the items pass directly to the named beneficiary upon death of the testator. The designation must be in a signed writing and dated.

There are possible undue influence and capacity problems with the will.

A testator must have capacity to make his will. This capacity is less than that required for making a K. It requires (1) knowledge of your assets (2) knowledge of natural objects of bounty; (3) Know the disposition of the assets that you are making.

There is not enough info in the facts to know exactly whether he had capacity. The more specific the will is in mentioning specific assets and mentioning the children (a statement like I have 3 children X, Y, & Z and have not provided for them) helps establish capacity.

The biggest issue here is undue influence. This occurs when a person in a fiduciary relationship substitutes his/her will for that of the testator.

Here Jim and Wanda were neighbors and began caring for and living with Rich. They tended to his personal and health care needs. They took him out when needed and restricted his visitors. This probably creates a relationship sufficient to establish fiduciary duties.

Jim and Wanda controlled who saw Rich. They took him to their attorney to have a will drafted. They took him to the bank to add their names as POD beneficiaries.

These acts, along with Rich's probable deteriorated capacity after the stroke, helps establish that his will was overcome by the influence of Jim and Wanda. However, the flip side to that is that they became like children to him and cared for him when his own kids wouldn't. This fact makes it more difficult to call this a clear case of undue influence.

The children definitely have an argument that undue influence and capacity negate the provision of the 2001 will and POD beneficiary designation.

7/02 Exam MEE Session Question 2 - Sample Answer # 2
Missouri Board drafted this question in lieu of MEE 2.

(1) Todd's brother, Rob, will inherit Todd's property through intestate succession.

A will must be presented to probate within one year of the testator's death. If it is not admitted by that time, the testator's property will pass through intestate succession as though he never had a will.

Here, Todd (T) died on July 15, 2000, but Tina did not admit the will to probate until September 2001. This is a period of more than one year (although, had Tina admitted the will to probate upon discovery of the will she may have met the deadline - the facts are unclear). Therefore, the will is disregarded and T's estate is distributed through intestate succession.

At a T's death, under MO intestacy, the estate is distributed per capita with right of representation. It first goes to spouse and issue, but there are none here. Then it goes to parents and siblings. T's parents are deceased, and his only sibling is Rob. Therefore, Rob takes Todd's estate, undivided.

(Q2) It is possible for one to disinherit their children by their will and POD accounts. A will may exclude anyone, including issue, for any reason that doesn't violate public policy. A P.O.D. account beneficiary may be whomever the testator wishes. Children do not have a right to be named a beneficiary of a P.O.D. account or a will.

However, the circumstances in this case are suspicious and raise issues of capacity and undue influence by Wanda (W) and Jim (J).

A testator must have capacity for a will to be valid and accepted to probate. Capacity requires that the testator know the objects of his bounty, the nature of his estate, that he is making a will, and that he is of sound mind.

When challenged, the party claiming testator had capacity has the burden to prove capacity. The burden then shifts to the party claiming incapacity.

A person is not incapacitated merely because they are sick, "addled," or dying. However, a showing of undue influence, such that the testator's will was overcome by another, can show incapacity. This can be demonstrated by showing great influence over the testator and making the testator procure a will making that person a beneficiary.

In this case, W & J must meet their burden by showing that Rich had capacity in early 2000 and late 2001 when he changed his P.O.D. and will to make W and J the primary beneficiaries. They must show he knew the objects of his bounty, the nature of this estate, that he was of sound mind and knew he was making a will.

Then the children must demonstrate Rich's incapacity through the combined factors of the stroke and undue influence by W and J. However, W and J can argue that they did not overcome the

will of Rich, but that Rich was tired his children did not visit, and was compensating W and J for their kindness by taking care of him.

The children can argue that W and J exerted undue influence by failing to let Rich see family and friends and only letting him leave the house to go to the bank and see his attorney.

Therefore yes, Rich can disinherit his children by will and P.O.D. accounts, but in this case will be subject to scrutiny of his capacity to enter into such arrangements.

7/02 Exam MEE Session Question 2 - Sample Answer #3
Missouri Board drafted this question in lieu of MEE 2.

Q1. Under Missouri law, a will must be admitted to probate no later than one year after the decedent's death. If the will is not admitted within this time, the will fails and the testator's estate passes by intestacy. By Missouri statute, a testator that dies without spouse or children has his estate passed equally between surviving siblings when there is no parents alive. Missouri intestacy directs that the estate is divided per capita with right of representation.

In this case, Tina did not present the will to probate until over 1 year after decedent's death. Therefore, the will fails and passes according to intestacy. Rob is decedent's only sibling and his parents are deceased and he has no wife or children. Because Rob is alive, Tina takes nothing and Rob gets the entire estate.

Tina could argue for equitable relief with distribution to her based on Todd's intent and her innocent failure to realize she took under Todd's will. However, this argument will fail because of the strict 1 year requirement.

Q2. Children may be disinherited by a will leaving an entire estate to another. There are two exceptions: (1) pretermitted children and (2) failure to devise all property under a will. Pretermitted children are children who are born after a will is executed. They take their intestate share unless the intent they not take was expressed in the will. Second, if a testator fails to devise all property in a will, the remaining property passes by intestacy and thus may pass to children, even if testator expressly omitted the children from the will.

Similarly, "pay on death" beneficiaries need not be children, but anyone the account holder desires. In this case, then, Rich can disinherit his children and neither exception appears to apply.

Beneficiaries who would stand to gain money were a will or other document held invalid have standing to challenge that document. There are two ways that either document may be held invalid: (1) if Rich lacked mental capacity at the time of execution, or (2) undue influence. The parties challenging bear the burden of proof on undue influence and the proponents bear the burden on mental capacity.

In order to have mental capacity, the testator must understand what a will does, know the natural objects of his bounty, his property (not specifically), and what he is doing. In this case, Rich suffered a stroke in 1999. Jim and Wanda must prove that he had mental capacity at the time of the execution of the will and "pay on death" clauses. The burden would then shift to the children to show lack of capacity. The facts do not give enough information to determine the outcome, but because such little capacity is required, the children would probably lose on this point.

In order to prove undue influence, the party asserting it must show influence, that the devise was not the testator's intent but that of the influencer, and "but for" the influence, testator would not have devised his property this way. The test is difficult, looking at the whole circumstance with

factors such as: vulnerability of testator, opportunity to influence, and any "special relationship." Yet, one of these is not enough on its own.

In this case, the children will also likely lose, although it is a closer case. Testator was likely vulnerable from the stroke, Jim and Wanda had the opportunity to influence, and there may also be a "special relationship" because he considered them like family. In addition, there is evidence showing they prevented him from seeing others. However, there may not be a "but for" connection. Although the 1995 will left the property to the children, their estrangement may have led him to make this changed devise on his own anyway.

7/02 Exam Multistate Essay Examination Question 3 - Sample Answer #1

1. Under 28 USC§1404(a) venue may be transferred to a court that would have been a proper venue if originally brought there. Under 28 USC§1391, the federal venue statute, venue is proper where any defendant resides if they all reside in the same state, any district where a substantial amount of the events or property giving rise to the transaction may be located, or if none any district where Buyer would be subject to personal jurisdiction. State N doesn't fit any of these criteria, because we are told in the question that the parties have no connection between State N and the parties or the transaction. (Thus precluding the possibility of Buyer having the requisite minimum contacts to support jurisdiction.)

So the Buyer must rely on the forum-selection clause to transfer the venue. The United States Supreme Court has been very liberal in upholding forum-selection clauses. See Carnival Cruise Lines, Inc. v. Shute. In that case the S.Ct. upheld a forum selection clause, which was contained in the agreement that the passengers made when going on the cruise, even though the passengers had no say in the forum, and didn't take part in the negotiation. Here the seller participated in a lengthy negotiation process and agreed to sue in State N. Thus under the federal case law arguing that State A is more convenient is likely not good enough.

He may argue that because this is a diversity case, the district court of State A should under Erie RR v. Tompkins apply the State A standard for upholding forum-selection clauses, and thus stop the transfer. There is no federal rule on point, so we have a state substantive standard in conflict with federal judge made law. Is it outcome determinative (Guaranty Trust v. York)? Probably not. There was also a choice of law clause here, and no matter which District Court hears the case, State N law will be applied. Is the expert judiciary enough to make applying the federal standard outcome determinative? Probably not. And the federal judge-made rule is arguably procedural because it deals with proper venue. Thus we should apply the federal rule if it promotes the twin aims of Erie (avoid forum shopping and promote uniform application of the laws.) Here it does, if we apply the state rule, parties could agree to contracts and sue in federal court to avoid living up to their agreements under the K. Since state rule is probably not outcome determinative, the federal rule is arguably procedural, and it would promote the twin aims of Erie, the court should apply the Federal Rule.

It should transfer to State N based on the forum selection clause.

2. Buyer's request for a protective order should not be granted. Federal Protective orders are governed by Rule 26 (e). This contract was a careful negotiation between Buyer and Seller, where the German buyer agreed to be sued in the States. It consented to venue, jurisdiction and service of process in State N.

Buyer is a party and its officers and directors are the agents and authorized representative. A party once, jurisdiction has been established, is not beyond the subpoena power of the United States. Here Buyer consented to be sued. It can't consent to be sued in the States and then get an order saying its officers don't have to show up to be deposed. The officers and directors are the parties with knowledge of the contract negotiations. Allowing this would authorized a suit but

no chance to properly litigate it.

Maybe seller gets a protective order saying parties must meet half-way to ease the burden of showing up (say do the depositions in England.) But they will have to appear.

7/02 Exam Multistate Essay Examination Question 3 - Sample Answer #2

1. The court should transfer the action to State N. At issue is whether the question presents a valid forum-selection clause, and if so, should the court transfer the action to State N. The federal courts will uphold a forum-selection clause, provided it is 1) reasonable and 2) mutually assented to between the parties.

In this case, the facts state that State N is convenient to both parties regarding air links, thus making potential litigation fair for witnesses and the parties. Further, State N is widely respected for its competence in commercial law matters. Therefore, it seems that State N would be reasonable as to both parties. Further, the parties had many negotiations and finally agreed (ie - mutual assent) to a State N judicial process. As such, it seems the forum-selection clause is valid and enforceable.

However, the court, in its discretion, may transfer the case to another state if it is deemed to be more convenient for the parties and witnesses, assuming the new venue would also have been proper at the time of filing the suit. Venue is proper in any state where any defendant lives so long as all defendants reside in that state or where a substantial part of the cause of action arose. If the forum selection-clause is deemed invalid by the court, it will consider whether State A is proper venue. In this case, none of the defendants live in the states, and the facts state that negotiations under the contract took place in Germany.

It seems that State A would not be the proper venue under these facts, and because the court has discretion to transfer, it is likely to transfer to State N.

2. The Buyer's request for a protective order should not be granted. At issue is the grounds for granting a protective order. Protective orders are reserved for individuals who are seeking protection from disclosing a privileged communication or a privileged document. They are not granted to avoid being subpoenaed.

In this case, the defendants seek to avoid the subpoena because they are in Germany. Upon these facts, defendants should be required to testify. As such, the motion for protective order should be denied.

7/02 Exam Multistate Essay Examination Question 3 - Sample Answer #3

1. Federal courts are courts of limited jurisdiction. Jurisdiction is appropriate if the courts have subject matter jurisdiction or diversity jurisdiction. Diversity jurisdiction is appropriate where the parties are citizens of different states or the controversy involves a citizen of the United States and a citizen of a foreign country. Diversity jurisdiction also requires that the amount in controversy exceed $75,000. In this case, Seller is a citizen of State A. A corporation is a resident of the state where it is incorporated or has its principal place of business. Buyer is from Germany. The amount in controversy is $500,000 and therefore State has jurisdiction over the case based on diversity jurisdiction.

A federal court sitting in diversity must apply the laws of the forum in which it sits. This includes the applicable choice of law rules for that forum. The district court in State A must therefore apply State A's choice of law rules.

Generally, a forum-selection clause in a contract is valid. The exception are where a party shows that the selected forum has no reasonable interest in the outcome of the case or where it is shown that the forum selection clause was not the result of mutual assent. In this case, however, there are two merchants and the State A district court could find that Seller entered into the contract with eyes open.

Transfer under 25 USC§1404(a) is appropriate when venue is improper. Venue is appropriate for a corporation where (1) the corporation is located; (2) where the place of incorporation took place, or (3) where the cause of action accrued. In a contract dispute, the cause of action accrues where the contract was negotiated. In this case, venue is not proper under any of the above mentioned possibilities. Also, parties may contract to allow a particular forum to have personal jurisdiction over their claims. Since this is the case, and in addition to all that was mentioned above, the district court in State A should transfer the action to State N.

2. A protective order should be granted if a party faces unduly burdensome and harsh conditions if forced to comply with a discovery request. In this case, since the officers, directors, and managing directors are all in Germany, the taking of depositions in State A could be difficult. However, Buyer stated that the grounds for a protective order were based on the court's lack of subpoena power over the Buyer's representatives. This is not an appropriate ground for a protective order and therefore the request should be denied.

7/02 Exam Multistate Essay Examination Question 4 - Sample Answer #1

1. Motors has in its possession a Cashier's Check for the $25,000 that was negotiated to it by Driver. First Bank is the drawee of the check. However, unlike a normal third party check situation, a certified check (such as a Cashier's check) is handled differently than a normal draft (check) under Article 3. On a normal check the bank as drawee is not primarily liable to pay the payee until it becomes an acceptor by certifying the check. However with a Cashier's Check, the drawee bank has already certified the check and thus I believe becomes primarily liable to pay the check to a holder. A holder is a party in possession of the check with the rights to enforce the check. First Banks argument is that the consideration it gave in issuing the Cashiers check to Driver has failed and thus it should not have to pay Motors. Although this situation is different than the normal holder in due course situation I believe that it would apply here. Driver negotiated a negotiable instrument (the Cashier's Check) to Motors who took it in good faith, for value without any notice of any claims or defenses on the instrument. If Motors is a HDC then the personal defense of failure of the consideration against Driver will not be good against them and they will only take the cashier's check subject to the 10 real defenses enumerated in Article 3.

The one defense that they might have taken subject to is the notice of overdueness. I believe that a check not negotiated within 60 days from the time it is written is overdue. Thus First Bank can argue that Motors is not a HDC because they took the Cashiers Check with knowledge that it was four months overdue.

Thus if Motors does have HDC status (which is doubtful as explained above) then it could prevail over First Bank. If Motors is just a holder then First Bank can argue its personal defense of failure of the Cashier's Check consideration against Motors. If so, then First Bank might escape paying the check. However the problem that it was a certified check (a Cashier's Check) remains. If Motors prevails because a drawee who certifies a check becomes primarily liable on it then First Bank will have to seek repayment from Driver.

Motors will have an argument under Article 3 or normal contract law against Driver. If Motors cannot collect on the Cashiers Check because First Banks personal defense can be used against them then it can clearly go after Driver for indorsers liability or drawers liability on the Cashiers Check. This type of liability could be secondary, however if unable to collect from First Bank (again doubtful due to the certified check) Motors can recover for breach of transfer warranty from Driver or secondary liability as the drawer of the check.

Transfer warranties attach to every transfer of negotiable instruments (whether or not endorsed) and include:

1) Warranty of title (right to enforce)
2) Signatures are genuine
3) No defenses against transferring party
4) No alterations
5) No knowledge of insolvency

Driver would have at least breached his transfer warranty that the drawee of the draft didn't have any defenses that were good against him. By getting his bank to issue him a Cashiers Check based on failed consideration (the bad loan from Auto Loans) Driver knew that a defense against him existed. Motors could also claim recession of the contract because of failure of the Cashiers Check. When a check is used as consideration under normal contract law it only suspends the obligation until payment is received. If for one of the reasons stated above Motors was completely unable to collect against First Bank, then it could at least collect on the suspended obligation due to its acceptance of the check under contract law.

Thus in summary, Motors best argument is that the Cashiers Check is a certified check which has been accepted for payment by the Drawee bank and thus must be paid regardless of the failure of the underlying consideration. First Bank should pursue remedies against Driver for that. If that argument fails for Motors then it should seek remedies under Article 3 or contract law against Driver. Either way it is doubtful that Motors will not get paid. I believe that First Bank will probably wind up having to pay the Cashiers Check and then go after Driver.

7/02 Exam Multistate Essay Examination Question 4 - Sample Answer #2

Because Motors accepted the cashier's check dated 5/11 from Driver as payment for the sports car Motors is not a holder in due course. To be a holder in due course, one must (1) take a negotiable instrument by negotiation & thereby become a holder and furthermore must also (2) give value, (3) in good faith and (4) without notice of things such as the instrument is overdue or that the instrument has been altered or that the instrument has been dishonored. While Motors is a holder because it has physical possession of the cashier's check which is a negotiable instrument under Article III as it is an unconditional promise to pay (to order of the payee) a designated amount of money upon demand signed by the drawer (First Bank), it had notice the check (a form of a draft) was overdue because checks are deemed overdue in 90 days after issue. Thus the check was issued May 11 and the date Motors took was September15 (more than 90 days later.) This defeats the fact that Motors did give value - the car - and took the note in good faith. As a result, Motors is subject to any claims and defenses on the instrument. Furthermore, Motors may have difficulty pursuing Driver on the underlying transaction (the car sale,) because the Driver is not the drawer of the check issued for the transaction. If, however, Motors chooses to pursue on the instrument it would have to pursue First Bank because Driver did not sign the check (a cashier's check.) One can only be liable on an instrument if he/she signed it (indorsed). First Bank, in issuing the cashier's check, is the drawer and is liable in the event of dishonor, which occurred.

The best option for Motor is to pursue the Bank on the cashier's check as Motor is a holder and therefore entitled to enforce.

(It will then be up to First Bank to address the problems of the dishonor of the $25,000 instrument Driver negotiated to First Bank. There will be problems for First Bank in recovering for Driver although Driver was initially liable on the instrument as an indorser because no notice was provided to Driver with regard to dishonor 30 days after First Bank received notice of such dishonor (which is presumably at least 30 days before September 15.) Failure to provide such timely notice to an indorser eliminates the indorser's liability on the instrument.)

7/02 Exam Multistate Essay Examination Question 4 - Sample Answer #3

The first issue is the liability between a holder and a certifying bank.

In this case, Motors is the holder of the 25,000 Cashier's check. The bank, First Bank, is the drawer of the check.

The general rule is that a drawee is not liable to the holder of a check. However there is an exception when the bank certifies the check, the bank then becomes liable to the holder.

In this case, 1st Bank certified the $25,000 check. A Cashier's Check is a certified check. As a result, when Driver comes to First Bank, First Bank must pay on the check.

Therefore, Motors has a right to collect from First Bank. First Bank had several months to notify the parties of the problem with the Auto loan check. As a result, it makes sense that First Bank should be responsible for the loss as to Motors.

The second issue is the liability as between the holder and the party who gave the instrument to satisfy an obligation.

In this case by giving the check to Motors, a certified check, the obligation of Driver was relieved. A certified check is like cash. Because the bank must pay, the obligation of Driver should be released.

Motors was a holder in due course of the Certified Check. The Check was a negotiable instrument, negotiated, to a holder in due course without notice of defenses. Motors did not know of the defense that the bank had to raise. They in good faith gave value for check. As a result they should not be responsible to bear the loss. A holder in due course is <u>not</u> subject to personal defenses, only real defenses.

By certifying the check, the Bank was essentially the drawer. Therefore, the banks defense of failure of payment by Auto loans is not a real defense (fraud in factum, forgery, adjudicated insanity, alteration, infancy, illegality, discharge in insolvency, duress, statute of limitations, or suretyship). The bank should bear the loss.

Motors should recover from Bank but should not recover from Driver. The bank only has personal defenses.

7/02 Exam MEE Session Question 5 - Sample Answer #1
Missouri Board drafted this question in lieu of MEE 5.

Y = Income

(1) Child support (CS) in MO is determined according to Form 14 and the Income (Y) Shares Model which determines each spouse's duty to pay based on the proportion of their current monthly Y. The amount generated by Form 14 is presumptively correct, but may be modified in light of the following factors... financial resources of both parents and child, standard of living of child if still married, physical/mental condition of child (i.e.. handicaps, disabilities) and any other relevant factor.

Both parents with Y are expected to contribute to child support. The non-custodial parent pays the custodial parent. Here, the Form 14 amount will likely control the amount of CS W gets, which will certainly include a payment from H each month.

(2) Need is a threshold requirement for maintenance. W is entitled to maintenance only if she is not able to meet her reasonable needs via the property distribution or via reasonable means of employment. The fact that W may have to care for the kids affects whether she has the ability to get employment.

Relevant factors in MO for maintenance are: (not in statutory order)

(1) comparative earning capacity of each spouse
(2) ability to obtain training and cost of training
(3) length of marriage
(4) age and physical condition of spouse
(5) parties conduct during marriage
(6) any other relevant factor
(7) ex-spouse's ability to pay
(8) contribution to marriage
(9) time necessary to rehabilitate & get appropriate employment to meet needs

In this fact pattern - of relevance is that W has a degree, she cared for the kids while H worked (contributed to marriage) & has 3 kids to raise. That is, she may not be able to obtain employment at this time.

(3) The court should probably modify CS & W will have to pay. In MO, there is the 20% rule - if there is a deviation in the amount of current child support and the amount of CS under the Y Shares Model w/current Y and it deviates by 20%, there is a presumption of a change/modification in CS.

In general CS is modifiable based on continuing and changed circumstances so as to make the original order unreasonable. Here - H earns more $ b/c of a promotion - such Y is relevant to the std of living the kids would have if P's married thus an increase in obligor's Y can modify CS. The kids expenses which increase via age are also relevant to a modification.

W earns $ now b/c of the business. As such, she will be required to pay CS under the Y Shares Model. She cannot avoid her obligation to support the kids. On the other hand, H cannot avoid CS b/c W makes more. Both parents have an obligation to pay CS for their children.

In this fact pattern, given the substantial and continuing change in Y, the court should use Form 14 with the current Y figures and if a change of 20% exists, use those #'s and award CS accordingly.

(4) Maintenance is modifiable based on substantial and continuing changed circumstances so as to make the original order unreasonable. The court looks at changes in obligor's Y and changes in obligee's Y. Here - both exist, b/c W now has Y and may be able to appropriately provide for herself, maintenance should be reduced or terminated.

H has a valid argument that maintenance should decrease and perhaps terminate b/c it appears that W can provide for herself – in fact, W makes more $ than H. This is a good case to end maintenance - it no longer serves its purpose. W has been providing for herself.

(5) The court cannot consider H's remarriage, and new kids of wife. In MO - there is a preference for the first family. Even though H supports Nancy's kids, this is not an appropriate factor to look at. On the other hand, W may have Y imputed to her. A voluntary termination of one's job does not justify a decrease in CS. B/c W voluntarily quit her job, Y should be imputed to her. W is still liable for CS based on her previous Y - despite her desires to enter a new field, Y is imputed to her.

Finally, H's changed Y is a factor b/c it goes to the standard of living the kids would have if still married.

Here, on these facts, the Court could increase H's CS b/c if the parents were still married, the kids would have a nicer lifestyle.

Thus it is possible Court increases CS to H.

7/02 Exam MEE Session Question 5 - Sample Answer #2
Missouri Board drafted this question in lieu of MEE 5.

1. Both parents are obligated to provide support to the children.

The court will look at a number of factors including the financial resources of both parents, the earning capacity of each parent, standard of living the children enjoyed during the marriage, the age of the children, educational needs of the children, and which spouse has custody of the children.

Generally the court will follow the Missouri Child Support Guidelines in awarding child support. The guidelines are formed by a percentage of each spouse's income. The custodial spouse's share of the child support obligation is presumed to be met through providing daily necessaries. The amount in the guidelines can be altered based on the above factors if the guideline amount is unjust and unreasonable under the circumstances.

2. A spouse may be entitled to maintenance if she cannot meet her reasonable needs without maintenance. The factors a court will consider include the financial resources of each spouse, the employability of each spouse, the duration of the marriage, the standard of living during the marriage, and the conduct of the parties during the marriage (especially fault as to adultery, battery and dissipation of assets.)

3. The Court should modify the child support. The standard for modification of child support is substantial and continuing changes. Factors that a Court will consider include changes in income of the parents and changes in financial needs of the children. If there is a 20% change in the amount of child support previously awarded and what would be awarded currently under the guidelines, there is a prima facie case of substantial and changed circumstances.

In this case, both parents have seen an increase in income, and Wanda alleges that the financial needs of the children have increased although she produces no evidence. Thus, an increase in support is warranted. The court will take into account Wanda's new income in determining each parent's proportionate share. Taking into account the fact that Wanda is the custodial parent, unless her income exceeds Henry's by a significant amount, the Court is not likely to order a 50% reduction in the amount Henry is liable for.

4. The Court should eliminate maintenance under these facts. The standard for modification of a maintenance award is substantial and continuing changes. The Court considers any increases in income by the parties and whether the are awarded maintenance can meet her reasonable needs. In this case, it appears that Wanda can now meet her reasonable needs. In fact, she now makes more money than Henry. Thus, under these facts maintenance should be terminated.

5. The Court should not modify the support order on these facts. Where a parent voluntarily reduces her income, that income will be imputed to her in determining the support award. Because Wanda voluntarily left her job, that factor cannot form the basis of a support modification.

Henry's counter-motion seeking a reduction is also likely to be denied. A parent who remarries and has children cannot use the new family as a sword to reduce a child support obligation to his first family. Thus, Henry cannot rely on his new family to reduce his support obligation. However, a re-married parent can use a new family as a shield against an increase in his support obligation. In this case, Henry can fight off Wanda's request for an increase in support by arguing that even if he is making more money, he now has another family to support so the support order should not be increased.

7/02 Exam MEE Session Question 5 - Sample Answer #3
Missouri Board drafted this question in lieu of MEE 5.

(1) Missouri has adopted presumptive guidelines in determining the amount of child support granted to a custodial parent. The formula considers many factors including the income of each parent, the need of the children and the number of kids. Factors Ct will look at include: Ability of non-custodial parent to pay, the need of the parent who has custody to provide for kids (not supposed to raise ex-spouses std. of living), the social and mental well being of the child, the education needs of the child, the lifestyle the kid would enjoy had parent not divorced (i.e. accustomed to).

It is very likely the children will receive child support payments from the non-custodial parent. Parents are supposed to pay equal portions of the cost of raising the child in accord with their income. Here Wanda will probably have income imputed to her if she chooses not to work unless she can establish a good reason why she can't work. She has a teaching certificate, the youngest child should probably be starting kindergarten this fall or at minimum could be attending a day care. The children are gone all day to school so there are no facts indicating a real need to avoid work.

(2) For an award of maintenance Wanda must make a threshold showing of need. She needs to show that she is unable to provide for her needs through reasonable employment. Here Wanda has a college degree. There are no facts regarding the job market but presumably Wanda could get a job. The factor to be considered: Henry's ability to pay (modest income - child support), the lifestyle Wanda accustomed to (lived on moderate income w/3 kids before), length of the marriage, conduct (misconduct) during marriage, party seeking support's needs.

In this case if Wanda were to receive maintenance it would almost certainly be temporary (rehabilitative) maintenance. This is because the marriage has only been 5 years, Wanda has not sacrificed opportunities to be trained (she has a college degree) but has forgone opportunity to work (in her favor). Rehab maintenance could be ordered long enough for Wanda to get on her feet, get a job, etc. Maybe even to get a Masters if the teaching degree is not real marketable. But the chances of long-term pension type maintenance are very slim. Of course all of this can be altered by a prenuptial or antenuptial agreement (but not child support or custody).

(3) In order to modify child support the moving party needs to show a continuing and substantial change. The 20% rule states that if the amount of child support you would be ordered to pay today is 20% different than what you are paying then a need for alteration is presumed. Here the CT should modify the child support because it appears that Wanda is making a lot of money - she will now need to pay a portion of the child support that is equal to her relative income. The Ct will now also have to look at the total income to determine the guideline amount - probably higher because of more income. The Ct will likely reduce the amount Henry has to pay. So effectively the child support total amount will probably be raised but Henry will probably actually pay less because now Wanda is going to be require to cough up her share due to her steady income now.

(4) A modification of maintenance also requires a continuing and substantial change in party's status. The fact that Ex-wife earns more than Henry is very good evidence for Henry that maintenance should be eliminated altogether. The facts would indicate that Wanda is no longer able to establish the threshold requirement of need and her lifestyle is at least as good as it was during the marriage. As discussed above the Ct would almost certainly have only granted temporary maintenance to begin with. Now Henry can show a continuous and substantial change because Wanda is now making a lot of money. The factors do not look good for Wanda b/c no need, support self, and lifestyle is good so I think good chance Court will end maintenance.

(5) Modification of child support still requires a continuous and substantial change. Henry contends that Wanda cannot avoid obligation by voluntarily quitting her job. He is correct. Wanda will need to establish a good faith reason she has quit her job and need to show a very good reason. If Wanda just quit because she wants to go to theater school, the Ct will impute income to her even though she isn't making money. The Ct would have to look to see how much more Henry is making and if it is substantial (20% rule) the Ct may still modify.

Henry's counter-motion is a loser. There is a preference for the first family and child support obligations cannot be reduced because of obligations to a second family. However, these obligations can be considered in Wanda's motion to increase Henry's child support.

7/02 Exam Multistate Essay Examination Question 6 - Sample Answer #1

1. Tahini: Sunrise is probably liable to Tahini for breach of contract because Adam had the apparent authority to bind Sunrise to the contract.

An agent will generally bind a principle in a K with a 3rd party if that agent has authority to act. Here Adam had no actual authority. He had no actual authority because Sunrise neither expressly, nor impliedly authorized Adam to purchase things that were not listed on Exhibit B. Therefore, Adam acted outside his actual authority.

Adam, however, probably acted in apparent authority. An agent has apparent authority to bind a principle if a party, reasonably relies on the representations of the principle in entering into the contract. Here, Sunrise sent a letter informing Tahini that Adam had authority to buy a host of different items. It matters not that the items that Adam bought were not in exhibit B. As long as Adam bought an item that can reasonably be construed to be in the realm of items listed in Sunrise's letter to Tahini, Adam will have had apparent authority, and Sunrise will be bound.

Therefore, Sunrise is probably in breach of K.

Moby: Sunrise is probably also liable to Moby for breach of contract. For the same reasons as listed above, Adam had apparent authority. But not only did he have apparent authority, he also had actual authority. These items were within the budget, listed on Exhibit B, and from local suppliers. It matters not that Sunrise didn't like the items, because they gave him the discretion to choose. Adam had both actual and apparent authority to bind Sunrise, and Sunrise is in breach.

2. Tahini: Adam may be liable for damages to Sunrise on the Tahini K for breaching his duty of care by negligently acting outside his authority. Agents generally owe a duty of care and skill to their principals. If Adam was negligent in exceeding his actual authority, then he may be liable to Sunrise for the damages he caused.

Moby Contract: Adam will probably not be liable to Sunrise on the Moby K. Here Adam had the actual authority to buy the item (see above discussion.) Sunrise left it up to his sole discretion. A court, however, will imply a duty of good faith in using that discretion, but here it does not appear as if Adam acted in bad faith. Adam will not be liable to Sunrise because he acted within his actual authority.

3. Sunrise may probably terminate its K with Adam without incurring liability. An agency relationship is by its nature consensual, and therefore terminable at will. Principals have the power, and usually the right to terminate their agents. The fact that there is a one year provisional limit probably does not change this result. This will probably be viewed as a durational limit on the agency relationship as opposed to a promise to keep the relationship intact for one year.

And even if the 1 year provision is seen as a promise to keep the relationship for a year, Sunrise

will have the right to fire Adam because Adam acted outside his authority with Tahini and was probably negligent for doing so. Therefore, Sunrise will not be liable to Adam.

7/02 Exam Multistate Essay Examination Question 6 - Sample Answer #2

(1) Will Sunrise be liable for contracts entered into by its agent, Adam? "Sunrise = Principal"

For a principal to be liable for a contract obligation, the principal's agent must have had authority to enter such contracts. There are three types of authority: (1) actual; (2) apparent; (3) and ratified authority.

Actual Authority is any authority with which a reasonable agent believed his principal vested upon the agent. Actual authority can be express or implied. However, actual authority is no longer valid after terminated by the principal.

In this case, Adam had no actual to enter the contract with Tahini. Adams express actual authority in his contract limited him to buy only items complying with exhibit B style guidelines. Since the facts state Tahini's products are not within those guidelines, there is no actual authority. Plus, there is no reasonable basis to believe Adam thought he had authority to buy a Tahitian design. Therefore, Sunrise will not be bound to Tahini by actual authority.

In this case Adam had actual authority to enter the contract with Moby. According to Adams agency contract he had authority to purchase the style of goods he bought from Moby. Therefore, Principal is bound to the Moby contract via Adam's actual authority.

Apparent Authority exist when the principal cloaks the agent with authority and the buyer reasonably relies on such apparent authority.

In this case, Sunrise sent Tahini and Moby a written letter signed on company stationary that stated Adam had authority to enter contracts for the types of goods sold by Tahini and Moby. In the letter, there was no restriction for the style of the goods or goods were subject to Sunrise's satisfaction. Therefore, since this was apparent authority, and Moby and Tahini could reasonably rely on the letter as authority, Sunrise is bound to Tahini and Moby by apparent authority. It is no defense that Tahini's contract was for the wrong style or that Sunrise was not satisfied with Moby's goods, because such restrictions were not placed in the apparent authority.

Ratified Authority is when there was no actual or apparent authority yet the principal accepts the benefits of the contract after a full disclosure.

In this case, there is no indication that Sunrise accepted the benefit of Tahini's or Moby's contract. Therefore, Sunrise is not bound by ratified authority.

(2) Adam is liable to Sunrise. All agents owe a duty of obedience to his or her principal. This duty requires the agent to follow reasonable instructions of the principal.

In this case, the agency contract for Adam specifically set forth instructions for Adam to follow in designing the interior of the hotel. Adam was an expert and it is reasonable to assume he had a clear understanding of the style restrictions. Therefore, when Adam disregarded those

instructions and bought a different style from Tahini, he breached his duty and is liable for damages for his breach. Damages may include liability on the Tahini contract, since Sunrise is now bound to the contract.

Adam did not breach his duty of obedience with respect to the Moby contract. Adam followed all of Sunrise's instructions. Therefore, Adam is not liable for the Moby contract.

In conclusion, Adam breach his duty with respect to the Tahini contract, but not with respect to the Moby contract.

(3) A principal may terminate a agency contract at anytime. However, if the agency agreement is for a specific term or undertaking, and the contract is terminated before such time, the principal will be liable for breach. However, if the agent breached his fiduciary duties, the principal has grounds to terminate early and avoid liability for early termination.

In this case, the agency contract was for 1 year. Sunrise may terminate before one year is up, but may be liable for damages. However, Adams breach is a sufficient ground to terminate the agency contract. Therefore, since Adam breached his duty of obedience as discussed above in #2, Sunrise will not be liable for an early termination of the fixed agency agreement.

7/02 Exam Multistate Essay Examination Question 6 - Sample Answer #3

A principle is liable for the act of his agent if the agent had actual or apparent authority.

Actual authority is that which the principle has manifested to the agent. It can be express (go buy 100 crates) or implied by the position or job the agent is in (performing minimum K if you're a VP).

Apparent authority occurs when the P holds the A out as his agent and third parties reasonably rely on the holding out.

Here Agent had actual express authority to make selections from local venders and of items previously approved.

P will be liable to both Tahini and to Moby. P held A out to be its agent by sending T and M a letter on its letterhead. T and M reasonably relied on the letter in dealing with A.

A also had actual express authority in dealing w/Moby because A stayed w/i the limits of the authority. Even though he didn't have actual authority w/respect to T (not w/i Exhibit B guidelines), the apparent authority will bind P to the K.

(2) An agent is not liable to its principle for acts which it was expressly authorized to do. Therefore, A is not liable to P in its K with Moby.

However, A exceeded his agent authority in the K w/Tahini. He could therefore be liable to P for any damages.

(3) Agency is generally revocable at the will of either the P or A. It terminates at death of either party.

It becomes irrevocable if coupled with an interest. Also if the agency agreement provides for a duration, under contracted principles, both parties are bound.

If P terminates A, it could be liable for breach of K. However, A has exceeded his agency capacity and authority. P might be justified in breaching the agency relationship and might not owe any damages to A.